AMO REPORTS 85-7

INTERVENOR FUNDING AND COST AWARDS BY PROVINCIAL HEARING BODIES

THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO
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ASSOCIATION OF MUNICIPALITIES OF ONTARIO

The Association of Municipalities of Ontario, a non-partisan voluntary organization, is united to promote the values of the municipal government system and the status of the municipal level of government as a vital and essential component of the total intergovernmental framework of Ontario and Canada.

The Association acts as the collective voice of Ontario's municipal governments and is organized to accomplish through cooperation and coordination, what the majority have neither the time nor the resources to do individually.

The Association represents some six hundred (600) municipal governments throughout Ontario. The governing body is composed of some eighty (80) municipal elected and appointed officials, who in turn represent a wide-range of municipal government interest.

The following sections and affiliated municipal professional associations form an important part of the Association's structure and therefore, play an important part in its activities in terms of the Board of Directors, program and policy development:

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* County and Regional Section
* Large Urban Section
* Northern Ontario Section (FONOM/NOMA)
* Rural (ROMA) Section
* Organization of Small Urban Municipalities Section

Association Affiliates:

* Association of Municipal Clerks and Treasurers of Ontario
* Association of Municipal Tax Collectors of Ontario
* Municipal Engineers Association
* Ontario Municipal Administrators Association
* Ontario Municipal Personnel Association
* Ontario Municipal Social Services Association
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AMO Report 85-7 "Intervenor Funding and Cost Awards by Provincial Hearing Bodies" was submitted to the Honourable Bernard Grandmaitre, Minister of Municipal Affairs, the Honourable James Bradley, Minister of the Environment and the Honourable Ian Scott, Attorney General on December 10, 1985.

INTERVENOR FUNDING AND COST AWARDS BY PROVINCIAL HEARING BODIES

BACKGROUND

In 1982, the Association of Municipalities of Ontario participated in discussions on the proposed new Ontario Planning Act. During deliberations, the Association was invited to comment on the question of funding participants and intervenors appearing before regulatory boards and tribunals involved in the planning and development process. The Association did not adopt a specific position on the issue at that time.

This past year, many municipalities have expressed concerns regarding situations of administrative tribunals being approached by objectors to municipal projects for full or partial funding for their cases. At the initiative of the County and Regional Section Executive Committee, the AMO Executive Committee requested the AMO Planning and Environment Committee to undertake a thorough review of the subject.

The following principles were developed by the AMO Planning and Environment Committee, and subsequently approved by all the Section Executive Committees and the Association's Board of Directors.

INTRODUCTION

This report examines the related issues of intervenor funding and cost awards. As previously mentioned, the Association considered this matter in 1982, but did not adopt a specific position on the issue at that time. However, the decision of the Consolidated Hearings Board with respect to the Hamilton-Wentworth expressway plan has generated new concern among municipalities.

In the Hamilton-Wentworth case, the regional municipality had proceeded to the hearing stage of its expressway plans. Prior to the beginning of the hearings, the Consolidated Hearings Board ordered the regional municipality to pay $75,000 to help two groups of intervenors pay for lawyers and consultants so that they could present their case. The municipality appealed this decision on the basis that the Board did not have the authority to award costs in advance of a hearing and that even if it did, it acted arbitrarily in awarding costs without having heard evidence of the intervenors' need for funding or the case that they intended to present. The Divisional Court ruled in favour of the regional municipality and a motion for leave to appeal from that decision has since been denied.

The Hamilton-Wentworth case reflects the increasing involvement and impact of provincially established regulatory boards and tribunals upon the affairs of citizens and municipal governments. Practical realities make it impossible for the provincial legislature to exercise its total powers. The Province of Ontario cannot directly implement all the legislation necessary to regulate the day-to-day affairs of the people of the province. As a result, considerable discretion in legislative authority has been transferred to provincial boards, commissions and tribunals.

These provincial tribunals have been delegated the authority and responsibility of resolving issues encompassing highly complex political and technical matters. This is exacerbated by the fact that these tribunals have created a series of intricate rules of practice for the purpose of carrying out their individual legislative mandates. Thus arises the need for all participants in the process to demonstrate a high level of expertise in order to play an effective and meaningful role throughout the entire hearing process.

FUNDING PUBLIC PARTICIPATION

In Canada, and in Ontario, a high value is placed on public participation. We allow time off for voting, and contributions to federal and provincial political parties are tax deductible.[1] The provincial government strongly encourages public participation within the regulatory process, particularly with respect to the Planning Act and the Environmental Assessment Act.

The Association of Municipalities of Ontario also supports and encourages public participation within the regulatory process on the basis that such participation enhances decision-making and does not lead to unnecessary and costly delays in the project approval process.

In order to ensure effective decision-making through public participation, the Association recommends that the provincial ministries responsible for the legislation under which hearings take place should establish funds for cost awards and advance funding. However, the Association does not support the provision of funds to individuals or groups simply because they wish to participate; funding should only be awarded where the decision-making process has been or will be enhanced.

This recommendation is certainly not without precedent. "American attempts at regulatory reform have focussed on cost awards by the agencies from their own budgets."[2] Federal precedents include the Berger Commission Inquiry into the MacKenzie Valley Pipeline and the Lysyk Commission Inquiry into the Alaska Highway Pipeline. As well, "the Alberta Energy

Resources Conservation Board has been given the statutory authority to reimburse certain intervenors from its own funds with the permission of the Minister of Energy and Resources."[3]

There are also a number of Ontario examples of funds being established for public interest intervention. The Ontario Waste Management Corporation "has long been committed to providing funding to enable members of the public to participate in hearings on their proposals".[4] Recently, the Report of the Commission of Inquiry into Mobile PCB Destruction Facilities was released. A fund was established for interested citizens' groups to draw from, in making representations to the Commission. In its final report the Commission concluded that "the allocation of funding to parties substantially assisted the Commission in the carrying out of its mandate. All of the funded parties contributed to some degree to the process and to a fuller exploration of issues of concern to them."[5]

In view of the foregoing, the Association recommends:

> **That the provincial ministries responsible for the legislation under which hearings are held should establish funds for cost awards or advance funding and that funding should only be awarded where the decision-making process has been or will be enhanced.**

COST AWARDS/ADVANCE FUNDING

In funding public interest intervention the Association recommends cost awards over advance funding as the former approach lends itself to ensuring that the project approval process is not prejudiced or delayed unnecessarily. Cost awards can be used as an incentive to ensure that public interest groups do not unnecessarily delay proceedings. The cost award system encourages participants to provide useful information and perspectives.[6] The determination as to which groups should receive costs can be made by the hearing body.

"Direct grants and similar methods of funding involve the inherent risk that the money will not be used wisely or properly."[7] A further disadvantage of advance funding is that the funding body has an interest in the outcome of the process. "If an intervenor is directly funded by an administrative tribunal, they must watch that the tribunal's scrutiny of their intervention does not go beyond ensuring compliance with the intervention proposal and criteria for funding to become manipulation of the direction and content of the intervention."[8]

In view of the above, the Association recommends:

That public interest intervention should be facilitated primarily through a system of cost awards; and

That advance funding be considered only in those instances where it can be fully demonstrated that it is required and essential for the purposes of the proceedings, and where advance funding is being considered, that the funding decision should not be made by the hearing body, but by the ministry responsible for the legislation or an office such as the Attorney General's.

FUNDING CRITERIA

While AMO recommends that provincial hearing boards should establish funds for public interest intervention, and that cost awards should be favoured over advance funding, it is important that funding criteria be established to ensure that interventions will be worthwhile and to ensure objectivity on the part of the funding body.

As previously mentioned, the regulatory process is extremely complex and the rules of practice quite intricate. Consequently, the regulatory process can become tedious and time-consuming. Funding criteria are necessary to ensure that the process is not further delayed by frivolous objections. Therefore, AMO recommends:

That all provincial hearing boards, task forces, commissions, etc. adopt funding criteria; and

That in terms of cost awards, a criterion be included indicating that costs be awarded only where the participant has represented a substantial public interest and made a worthwhile contribution to the resolution of the issues at hand and where the intervention was carried out in a meaningful and efficient manner; and

That in terms of advance funding, a criterion be included indicating that advance funding be awarded only in those instances where it can be fully demonstrated that such funding is needed for the purposes of the intervention, that the intervening body has the ability and capacity to carry out its proposed intervention in a meaningful and efficient manner, and that the intervention will make a worthwhile contribution to the resolution of the issues at hand.

SUMMARY OF RECOMMENDATIONS

1. That the provincial ministries responsible for the legislation under which hearings are held should establish funds for cost awards or advance funding and that funding should only be awarded where the decision-making process has been or will be enhanced.

2. That public interest intervention should be facilitated primarily through a system of cost awards; and

   That advance funding be considered only in those instances where it can be fully demonstrated that it is required and essential for the purposes of the proceedings, and where advance funding is being considered, that the funding decision should not be made by the hearing body, but by the ministry responsible for the legislation or an office such as the Attorney General's.

3. That all provincial hearing boards, task forces, commissions, etc. adopt funding criteria; and

   That in terms of cost awards, a criterion be included indicating that costs be awarded only where the participant has represented a substantial public interest and made a worthwhile contribution to the resolution of the issues at hand and where the intervention was carried out in a meaningful and efficient manner; and

   That in terms of advance funding, a criterion be included indicating that advance funding be awarded only in those instances where it can be fully demonstrated that such funding is needed for the purposes of the intervention, that the intervening body has the ability and capacity to carry out its proposed intervention in a meaningful and efficient manner, and that the intervention will make a worthwhile contribution to the resolution of the issues at hand.

FOOTNOTES

1 Economic Council of Canada. Working Paper No. 17: Public Participation in the Regulatory Process - The Issue of Funding, February, 1981, pg. 24.

2 Ibid, pg. 48.

3 Consumers Association of Canada. Cost Awards in Regulatory Proceedings/A Manual for Public Participants. October 1979, Pg. 20.

4 Letter from D.A. Chant, Chairman and President of the Ontario Waste Management Corporation, to Ken Cousineau, Policy Analyst, Association of Municipalities of Ontario, July 29, 1985.

5 Report of the Commission on the Regulatory Control of Mobile PCB Destruction Facilities. June 28, 1985, pg. 12, Appendices.

6 Economic Council of Canada, pg. 50.

7 Ibid

8 Consumers Association of Canada, pg. 39

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